

WORKERS' COMPENSATION ADVISORY COUNCIL

**MINUTES ~ MAY 1, 1998 MEETING [1:00 P.M.]
710 JAMES ROBERTSON PARKWAY
HEARING ROOM, FIRST FLOOR
ANDREW JOHNSON TOWER
NASHVILLE, TENNESSEE**

The meeting was called to order by Mr. Carter H. Witt.

Voting members in attendance:

Mr. Carter H. Witt

Mr. Bob Pitts

Ms. Jimmie K. Corder

Mr. Othal Smith, Jr.

*Mr. Smith had proxies for Mr. James G. Neeley and Mr. Jack Gatlin

Nonvoting members in attendance:

Mr. Jerry Mayo

Ms. Jacqueline B. Dixon

Ms. Abbie Hudgens

Ex officio members in attendance:

Mr. Al Bodie, Commissioner of Labor

Mr. Neil Nevins, Assistant Commissioner of Commerce & Insurance
[designee for Commissioner Doug Sizemore]

Also present:

M. Linda Hughes, Executive Director

David Wilstermann, Statistical Analyst

The minutes of the February 2, 1998 Workers' Compensation Advisory Council meeting were unanimously approved.

A. PRESENTATION OF DRAFT REPORT OF RESEARCH PROJECT
[1996 Workers' Compensation Trial Judgments]

The first item on the agenda was a report by Advisory Council staff concerning the results of the research project which staff had begun in the summer of 1997. A formal draft report was presented to each member of the Advisory Council. Additionally, staff made an oral presentation of the results of the study. Linda Hughes gave a brief overview of the research project and David Wilstermann presented the technical results of the study. During the presentation staff indicated the results of the study are preliminary and more data is needed to comprise a sufficient data base upon which to base any conclusions the Advisory Council may draw from the data.

The research project entailed visiting at least one county in each of the 31 Judicial Districts and reviewing the court file and order for each workers' compensation case which was tried by the trial judge during calendar year 1996. Additionally, only cases in which the alleged work-related injury occurred after August 1, 1992, the effective date of the 1992 Reform Act, were included in the study.

The following summary of data was presented to the Advisory Council:

TRIAL INFORMATION:

Number and percent of cases tried by a judge	507	3.7%
Number and percent of suits filed by insurers/employers	33	6.5%
Number and percent of body as a whole cases	298	59.4%
Number and percent of scheduled member cases	204	40.2%
Number and percent of cases filed in county other than county of accident or injury	99	19.5%
Number and percent of cases filed in county of employee's residence	377	74.4%
Average time between accident/injury and trial date	2 years 18 days	
Shortest time between accident/injury and trial date	.3 years (about 3½ months)	
Longest time between accident/injury and trial date	4.1 years (about 4 years, 1 month)	

DEMOGRAPHIC INFORMATION:

Average age of the injured workers:	41.0 years	
Level of Education (Number and Percent):		
Less than high school education	107	32.6%
High school education only	147	44.8%
College degree	15	4.6%

Percent of back injury claimants with less than than high school education		39.8%
Number and percent of cases where employee received maximum weekly benefits	99	21.9%
Average weekly compensation rate [would include the maximum rate from four different years]		\$257.16

CASE INFORMATION:

Most frequent body as a whole injuries:		
Back [includes back sprains, strains, herniated discs, etc.]	181	35.7%
Shoulder	37	7.5%
Neck	30	7.5%
Head/Face	9	1.8%
Most frequent scheduled member injuries:		
Bilateral Carpal Tunnel	65	13.2%
Leg	65	13.2%
Arm	30	6.1%
Hand	17	3.4%
Carpal Tunnel (one arm)	12	2.4%
Number and percent of back injury cases where employee did not return to work for pre-injury employer	66	13.0%
Number and percent of bilateral carpal tunnel cases where the employee did not return to work for pre-injury employer	9	1.8%
Average number of physicians per trial		1.84
Number and percent of cases in which only one doctor gave PPI rating	146	28.8%
Number and percent of cases in which vocational expert was hired	42	8.3%
Average Highest Permanent Partial Impairment Ratings [excludes permanent total cases]		
Body as a Whole		12.6%PPI
Scheduled Member		13.2%PPI

Average Permanent Partial Disability

Judgments (%) Awarded [excludes permanent total cases]

Body as a Whole-Return to Work	23.4%PPD
Body as a Whole-No RTW	41.9%PPD
Scheduled Member-Return to Work	33.7%PPD
Scheduled Member-No RTW	41.6%PPD

Average Disability Judgment (\$) Amount

Body as a Whole*	\$32,732.79
Scheduled Member*	\$22,136.21

[Staff noted that these figures are directly affected by the worker's average weekly compensation rate and, therefore, generalizations should be avoided. For example, if you assume two injured workers, all variables equal (age, education, work experience, type of injury and PPD to body as a whole) award of 25% by court except one worker is from Judicial District 17 (average compensation rate of \$323.98) and the other from Judicial District 19 (average compensation rate of \$175.93), the first would be awarded \$32,398 and the second \$17,593.]

*Note the body as a whole cases are not separated according to work status and the scheduled member cases involve parts of the body which are equal to various weeks of disability benefits.

Average Permanent Partial Disability (PPD) Multipliers

Returned to Work Cases:

Body as a Whole	2.01
Scheduled Member	3.80

Did Not Return to Work

Body as a Whole	3.62
Scheduled Member	3.33

Return to Work Status Not Given

Body as a Whole	2.70
Scheduled Member	2.91

[Staff explained that the PPD multiplier is the ratio of the PPD judgment in dollars to the highest PPI rating given to the injured employee. For example, a worker injured his back but returned to work after being assigned a 5% PPI rating and a 10 % PPI rating. At trial he was awarded a 20% PPD judgment. Taking the first PPI rating, the multiplier would be 4.0 times; taking the second it would be 2.0 times.]

Average Multiplier for Back Injury Cases

2.75

[excludes permanent total cases-work status not considered]

Average Multiplier for Bilateral Carpal

3.37

Tunnel Syndrome Cases

[excludes permanent total cases-work status not considered]

Number and percent of cases where the

205

40.49%%

PPD award was less than or equal

to 2.5% times highest PPI rating

Number and percent of cases in which PPD award was between 2.5 and 6.0 times the highest PPI rating	142	28.0%
Number and percent of cases in which PPD award was greater than 6.0 times highest PPI rating	27	5.3%
Number and percent of trials where judgment for employer/insurer	75	14.8%
Cases Appealed:		
Body as a Whole	56	18%
Scheduled Member	21	10.3%
Total	78	15.4%
[*additional 15 cases settled or appeal dropped]		
Frequencies of Permanent Total Cases		
West Tennessee	10	7.5%
[Judicial Districts 24-30]		
Middle Tennessee	2	1.0%
[Judicial Districts 12-23 + 31]		
East Tennessee	12	6.7%
[Judicial Districts 1-11]		
Frequencies of Second Injury Fund Cases		
West Tennessee	10	7.5%
[Judicial Districts 24-30]		
Middle Tennessee	4	2.1%
[Judicial Districts 12-23 + 31]		
East Tennessee	17	9.6%
[Judicial Districts 1-11]		

B. REPORT OF COMMISSIONER BODIE RE: COMPUTER SYSTEM

Commissioner Bodie gave an update to the Advisory Council on the computer system which the Department is in the process of purchasing. He reported the Department began in the fall of 1997 working with OIR and other individuals with the State to develop the requirements of the system. On March 16, 1998, the Request for Proposal [RFP] was released. Four companies [Applied Computer Systems, Inc., BDO, Gulf Computers, Inc. and KPMG] sent formal proposals. On April 2, 1998, after the evaluation of the proposals was completed, the successful bidder - Applied Computer Systems - was announced. The low bid was \$772,000 [Applied] and the high bid was 8 Million dollars [BDO]. Thereafter, BDO filed a formal protest of the potential awarding of the

contract to Applied Computer Systems, Inc.

Commissioner Bodie stated the protest process is as follows: The State has 60 days to respond to the written protest. The response can range from “the protest was not timely”, “the protest has no merit”, etc. After the State files its response, BDO has 10 days to respond. After BDO responds, the State then has 60-90 days to file a response. After that response, if the protester is not satisfied it can appeal to an appeals commission comprised of Commissioners Snodgrass, Hayes and Ferguson. If the protester is dissatisfied with that decision it can then appeal to Davidson County Chancery Court.

Mr. Witt questioned whether this would delay the implementation of the system until the protest is resolved. Commissioner Bodie responded the State can go forward with awarding the contract; however, to do so would be to risk the possibility that the protester might ultimately win the case in Chancery Court. Mr. Mayo questioned the basis of the protest and inquired whether the Advisory Council could get a copy of the protest. Commissioner Bodie indicated he would check with the Department of Finance and Administration to see if he could provide a copy of the protest.

Commissioner Bodie told the Advisory Council the Department plans to respond as quickly as possible to the protest and expects to have the response filed by next week and at the outside within 20 days. Commissioner Bodie indicated he would update the Advisory Council on the issue at its next meeting.

C. REPORT OF EXECUTIVE DIRECTOR

>LEGISLATION UPDATE

Ms. Hughes reported the bill which was commonly known as the Joint Committee bill [SB2973] has passed in the legislature and the bill has been sent to the Governor. The bill, as passed, includes the following provisions:

- (1) the recommendation of the Advisory Council that the language of Senator Jordan’s proposed section be changed from “voluntary” medical treatment to “authorized” was accepted and the bill was so amended;
- (2) if an employer files a nonsuit, then either party shall have 90 days to refile the suit;
- (3) proposal/recommendation of the Advisory Council regarding the adoption of a data form to be filed with each final order was enacted as recommended with changes requested by the Clerk’s Association and TTLA to require the employer/insurer to file the form and to require the employee to cooperate in providing data to complete the form;
- (4) the drug free workplace changes were enacted, giving the Commissioner of Labor power to add drugs to the list - the implementation date of the act was not affected;

(5) the date of the annual report of the Advisory Council is changed to May 1 of each year;

(6) Commissioner of Commerce & Insurance is given the power to modify the NCCI recommended loss cost within the parameters of the NCCI recommendation/filing and the Advisory Council recommendation;

(7) a provision was added stating temporary employment agencies are not required to implement a drug-free workplace;

(8) the Advisory Council's recommendation the mileage reimbursement be lowered from 20 miles as first draft indicated to 15 miles was adopted-with provision that this specific mileage amount does not define "community" used in other portions of the Act;

(9) clarified the definition of "construction industry" in the section of the law which requires all subcontractors to have workers' compensation coverage; exempted persons building or making modifications on their own personal dwelling for own use and without compensation; and specified the section does not alter "casual employee" law;

(10) gave the Department of Labor power to reinstitute [in addition to institute] workers' compensation benefits;

(11) provided the State Treasurer [or his designee] shall be the Chair of the Advisory Council with authority to preside at meetings, supervise staff (under direction of the Council) and vote only on matters related to administration of the Council or the Council's research - also specified the Chair is not permitted to vote on any matter which constitutes the making of a policy recommendation to the governor or the general assembly.

Ms. Hughes also reported the proposed bills concerning psychologists and the county executive sections did not pass. She indicated the bill introduced by Senator Haynes making the removal of safety devices a misdemeanor was moving through the process as of the time of the meeting. A member of the audience indicated the bill had passed. The bill making it unlawful for the State to discharge an employee in retaliation for filing a worker's compensation claim was passed by both houses and became law without the Governor's signature. The bill allowing the pools to have the discount also passed.

>SUBROGATION ISSUE/ATTORNEY GENERAL OPINION

Ms. Hughes reported the Attorney General has provided his formal opinion concerning the constitutionality of the two proposals related to the subrogation recovery of case management costs. It is the opinion of the Attorney General the proposed legislation:

(1) does not violate due process because the legislation is rationally related to a legitimate state purpose [state has legitimate purpose to require case management and to allow recovery of the costs];

(2) does not violate the Tennessee Rules of Evidence because only the mention of liability insurance is prohibited - and workers' compensation insurance is not liability insurance;

(3) does violate the third party's right to a jury trial on the issue of damages because both of the

proposals make it the trial judge's duty to determine the reasonableness of case management costs in excess of \$4000.

The Attorney General's opinion indicates the use of conclusive presumptions of necessity and reasonableness up to \$4000 does not impermissibly impede the right to a jury trial. Ms. Hughes expressed her opinion that the formal Attorney General opinion would allow the conclusion that a statute which states all costs of case management are presumed reasonable and necessary would be constitutional. The Attorney General's opinion did state that while the use of conclusive presumptions appears to be defensible, a statute which establishes a rebuttable presumption would be preferable and clearly constitutional.

D. ADDITIONAL ISSUES/COMMENTS OF MEMBERS

The Executive Director reported the tentative August and September meeting dates previously set need to be changed because the NCCI plans to make its filing on July 31, 1998 and the tentative dates do not provide NCCI enough time to prepare its presentation to the Advisory Council and to allow the Advisory Council to meet its 60 day deadline for making a recommendation to the Commissioner of Commerce and Insurance. The following alterations to the tentatively scheduled meetings were made:

- (1) A meeting [to hear presentation of the NCCI regarding its loss cost filing] will be scheduled on either August 26, 27 or 28 depending on the availability of Mr. Neeley and the State Treasurer;
- (2) A meeting [to hear the report of the Advisory Council's consulting actuary and rebuttal comments from NCCI and to make a recommendation on the loss costs] will be scheduled on either September 22, 23, 24 or 25 depending on the availability of Mr. Neeley and the State Treasurer;
- (3) The June 19, 1998 meeting was cancelled;
- (4) The August 14, 1998 meeting was cancelled; and
- (5) The September 10 meeting was cancelled.

The meeting was adjourned at 2:45 p.m.